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Attorneys for Defendants K-M Industries
 Holding Co. Inc.; K-M Industries Holding Co.
 Inc. ESOP Plan Committee; and CIG ESOP
 Plan Committee

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THOMAS FERNANDEZ and LORA
 SMITH, individually and on behalf of a class
 of all others similarly situated,

Plaintiffs,

v.

K-M INDUSTRIES HOLDING CO., INC.;
 K-M INDUSTRIES HOLDING CO. INC.
 ESOP PLAN COMMITTEE; WILLIAM E.
 AND DESIREE B. MOORE REVOCABLE
 TRUST; ADMINISTRATOR OF THE
 ESTATE OF WILLIAM E. MOORE,
 DECEASED; CIG ESOP PLAN
 COMMITTEE; NORTH STAR TRUST
 COMPANY; DESIREE B. MOORE
 REVOCABLE TRUST; WILLIAM E.
 MOORE MARITAL TRUST; WILLIAM E.
 MOORE GENERATION-SKIPPING
 TRUST; and DESIREE B. MOORE, BOTH
 IN HER INDIVIDUAL CAPACITY AND
 AS TRUSTEE OF THE WILLIAM E. AND
 DESIREE B. MOORE REVOCABLE
 TRUST'S SUCCESSOR TRUSTS NAMED
 ABOVE,

Defendants.

) Case No. C06-07339 MJJ (BZ)
)
) **DEFENDANTS' K-M INDUSTRIES**
) **HOLDING CO., INC.; K-M INDUSTRIES**
) **HOLDING CO. INC. ESOP PLAN**
) **COMMITTEE; AND CIG ESOP PLAN**
) **COMMITTEES' OPPOSITION TO**
) **PLAINTIFFS' MOTION TO COMPEL**
) **PRODUCTION OF DOCUMENTS**
)
) Date: December 5, 2007 (if necessary)
) Time: TBA
) Courtroom: Courtroom G
) Judge: Magistrate Judge Bernard Zimmerman
)
) **DISCOVERY MATTER**

1 Defendants K-M Industries Holding Co. Inc., K-M Industries Holding Co. Inc. ESOP Plan
2 Committee, and CIG ESOP Plan Committee (collectively, "Kelly-Moore") hereby respond to
3 plaintiffs' motion to compel production of documents.

4 This litigation involves the formation of the Kelly-Moore Paint Company Employee Stock
5 Ownership Plan (the "Plan"). In October 1998, in the course of adopting the Plan, shares of Kelly-
6 Moore were sold to the Plan at a value supported by an independent valuation of the shares.
7 Plaintiffs claim that Kelly-Moore should have foreseen at the time of formation that future liability
8 for injuries caused by asbestos exposure would have a material effect on Kelly-Moore's financial
9 statements, and, accordingly, on the value of such shares, notwithstanding that it appeared at the
10 time of formation of the Plan that such liability was covered adequately by insurance and would not
11 have a material effect on the financial well-being of Kelly-Moore.

12 Plaintiffs seek the production of two documents comprising privileged communications
13 between Kelly-Moore and its attorneys, claiming that such documents relate to the administration of
14 the Plan, and accordingly, are subject to the fiduciary exception to the attorney-client privilege.
15 Because the application of the fiduciary exception to these documents is not clear, and because a
16 voluntary production of these documents by Kelly-Moore could create a subject matter waiver of the
17 attorney client privilege that could seriously damage the interests of Kelly-Moore in other litigation
18 if the documents were later found not to be subject to the fiduciary exception, Kelly-Moore seeks a
19 judicial determination that the two documents in question are in fact subject to the fiduciary
20 exception before producing them.

21 I. FACTUAL BACKGROUND

22 Most of the facts relevant to the issues raised by this motion are not in dispute. Kelly-Moore
23 had been named as a defendant in numerous asbestos personal injury lawsuits in the mid and late
24 1990s. Fortunately, it had purchased insurance against such a contingency. It was not until 2001,
25 when a large personal injury verdict was returned against Kelly-Moore, that the issue of liability for
26 asbestos injuries became a more serious problem. As national asbestos litigation matured and many
27 of the companies primarily involved in the production of asbestos filed for bankruptcy, that large
28

1 verdict caused Kelly-Moore to become a more visible target of plaintiffs claiming injuries due to
2 asbestos exposure. Simultaneously, additional uncertainty arose when coverage issues were raised
3 by Kelly-Moore's insurers. Kelly-Moore continues to be named in asbestos personal injury lawsuits
4 and presently is engaged in coverage litigation with some of its insurers. Accordingly, the
5 preservation of the attorney-client privilege protecting Kelly-Moore's communications with its
6 attorneys, especially on issues related to insurance coverage of asbestos claims, is of vital
7 importance.

8 II. ARGUMENT

9 A. The Fiduciary Exception Applies to Fiduciary Communications Concerning the 10 Administration of an ESOP

11 Kelly-Moore does not dispute the application of the fiduciary exception to communications
12 related to the administration of an ESOP. It is established that certain communications between
13 ERISA Plan administrators, acting as fiduciaries, and the attorneys retained by them, normally
14 protected from discovery by the attorney-client privilege, are subject to a "fiduciary exception" to
15 the attorney-client privilege. The consequence of the application of the fiduciary exception is that
16 the attorney-client privilege does not bar the discovery by Plan beneficiaries of otherwise privileged
17 communications.
18

19 Two primary rationales have been stated for the fiduciary exception. Some courts have
20 justified the exception on the theory that the fiduciary, when performing its fiduciary functions, is
21 duty-bound under ERISA to reveal all fiduciary communications to the beneficiaries. Other courts
22 have based their justification for the fiduciary exception on the argument that the beneficiaries are
23 the true clients being served by the attorneys when the fiduciary consults them on fiduciary matters
24 and, accordingly, the attorney-client privilege belongs to the beneficiaries. *United States v. Mett*, 178
25 F.3d 1058, 1063 (9th Cir. 1999).
26

27 Not all attorney-client communications by the fiduciary are subject to the exception. For
28 example, it is not enough that "otherwise privileged legal advice 'relates to' fiduciary matters" for

1 such advice to fall under the exception. *United States v. Mett, supra*, 178 F.3d at 1064 [emphasis
 2 added]. The exception only applies to communications made when the administrator is acting as a
 3 fiduciary. So, for example, the Supreme Court has held that "Employers or other plan sponsors are
 4 generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare
 5 plans. See *Adams v. Avondale Industries, Inc.*, 905 F. 2d 943, 947 (CA6 1990) ('[A] company does
 6 not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan')." *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). Thus, under ERISA, persons and
 7 entities otherwise deemed fiduciaries are not acting as fiduciaries when adopting, amending or
 8 terminating a plan.
 9

10 In addition, as plaintiffs acknowledge, the fiduciary exception does not apply to advice
 11 obtained by the fiduciary in protecting itself from potential claims.

12 [W]hile the fiduciary exception does apply to advice on matters of plan administration, the
 13 attorney-client privilege reasserts itself as to any advice that a fiduciary obtains in an effort
 14 to protect herself from civil or criminal liability.

15 *United States v. Mett, supra*, 178 F.3d at 1066. Accordingly, in determining whether the fiduciary
 16 exception applies, the courts are required to consider each communication separately, on a
 17 document-by-document basis.

18 In other words, it is not the terms of an engagement letter [establishing the attorney-client
 19 relationship], but rather the nature of the particular attorney-client communication that is
 20 dispositive. This communication-by-communication analysis, while perhaps untidy, is
 21 crucial if the attorney-client privilege and the fiduciary exception are to coexist.

22 *Id.* at 1064-1066. [emphasis added] Kelly-Moore proposes that it provide the documents in dispute
 23 to the Court for *in camera* review to aid it in making its determination should the Court deem this
 24 helpful.

25 **B. The Application of the Fiduciary Exception to the Documents in Question is
 26 Unclear and Requires a Privilege Determination by this Court in Order to
 27 Prevent the Possibility of a Subject Matter Privilege Waiver that could Cause
 28 Needless Injury to Kelly-Moore**

Although the fiduciary exception to the attorney-client privilege is itself well established, its
 application is decided on a case-by-case basis. Examination of case law reveals that it is difficult to

1 establish clear parameters for application of the doctrine to the documents in question. As discussed
2 above, Kelly-Moore is presently conducting crucial litigation with its asbestos insurance carriers
3 concerning the extent of its coverage. Because the documents in question are attorney-client
4 communications that relate to such coverage, Kelly-Moore is concerned that voluntarily producing
5 the documents could provide an argument to the defendants in the coverage case that such
6 production did not in fact fall within the fiduciary exception and therefore resulted in a wide subject
7 matter waiver of the attorney-client privilege. The application of such a subject matter waiver to the
8 files of the attorneys litigating the coverage litigation could cause serious injury to Kelly-Moore.

9 While the documents in question may fall under the fiduciary exception as claimed by the
10 plaintiffs because the information being discussed was sought by the company in connection with
11 determining what information to provide to the ESOP participants and the ESOP Trustee, the fact
12 that the documents deal with matters relevant to insurance coverage for asbestos claims against
13 Kelly-Moore, and thus do not deal directly with the administration of the ESOP, and the fact that the
14 documents relate to the time period during which the Plan was in the process of adoption, makes this
15 a borderline situation – it is impossible to predict with certainty whether the voluntary production of
16 these documents could be later held to create a waiver that would extend beyond the documents in
17 question.

18 III. CONCLUSION

19 Because it is important to Kelly-Moore, given the on-going coverage litigation, to insure that
20 no such waiver argument is created by the voluntary production of these documents, Kelly-Moore
21 joins plaintiffs in seeking a ruling by the Court concerning whether the documents fall under the
22 fiduciary exception, and an order directing that the two documents in question be produced to the
23 beneficiaries of the Plan in this litigation if it is found that they do fall within the fiduciary
24 exception.

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1 Dated: November 19, 2007

LOVITT & HANNAN, INC.

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3
4 By: _____ /s/
Terence F. Young
5 Attorneys for Defendants K-M Industries
Holding Co., Inc.; K-M Industries Holding Co.,
6 Inc. ESOP Plan Committee; and CIG ESOP Plan
Committee
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